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European Commission, Spain at Odds Over Transfer Tax Rules

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The European Commission has asked Spain to modify its transfer tax provisions relating to the acquisition of securities in real estate companies, arguing that the provisions are not consistent with article 5 of Council Directive 2008/7/EC concerning indirect taxes on the raising of capital.

The January 28 request (see *Doc 2010-2073* or *2010 WTD 19-14*) is part of a reasoned opinion (the second step of the infringement procedure established in article 258 of the Treaty on the Functioning of the European Union). (For prior coverage, see *Doc 2009-14432* or *2009 WTD 121-15*.) If Spain does not comply with the reasoned opinion within two months, the commission may refer the matter to the European Court of Justice.

Article 108 of Spain's Law 24/1988 on the securities market establishes that a 6 percent transfer tax (7 percent in most autonomous regions) applies to the transfer of securities of a company whose real estate assets in Spain represent more than 50 percent of its total assets, or whose assets include securities in another entity whose real estate assets in Spain represent at least 50 percent of its total assets, if the acquirer gains control of the real estate entity as a result of the transfer.

In the case of capital contributions of real estate companies, the company increasing its capital is also subject to a 1 percent capital duty. This measure was introduced in 2006 by Law 36/2006 on measures to prevent tax evasion, under which capital contributions are subject to transfer tax even though the company increasing its capital is already subject to capital duty.

The European Commission maintains that the imposition of a transfer tax in addition to the capital duty in such circumstances is contrary to Council Directive 2008/7/EC because the directive prohibits the levying of any taxes on capital contributions, apart from capital duty.

The ECJ supported that view in *HSBC Holdings plc and Vidacos Nominees Ltd. v. HM Rev. & Customs Comm'rs* (C-569/07) (see *Doc 2009-21722* or *2009 WTD 189-13*) and in *Commission v. Belgium* (C-415/02) (see *Doc 2004-14611* or *2004 WTD 138-10*). Also, the Spanish Supreme Court on September 24, 2009, decided to refer a preliminary ruling question to the ECJ on the same issue.

The European Commission's request likely came as no surprise to the Spanish government, as a recent law approved in October 2009 includes the government's declaration announcing that, in view of the infringement procedure opened by the European Commission in June 2009, Spain will analyze the compliance of article 108 with EU legislation.

While further developments on this issue are still pending, taxpayers likely already have sufficient arguments to contest paying transfer tax on the transfer of real estate companies by way of contribution into another Spanish company, or through a reorganization.

The ECJ's recent judgment in *Transportes Urbanos y Servicos Generales SAL v. Administracíon del Estado* (C-118/08), which paves the way to obtain a refund of taxes wrongly paid under EU law on the grounds of state liability for breach of EU legislation, is also relevant. (For the judgment, see *Doc 2010-1830* or *2010 WTD 17-14*.)

An action for damages against the Spanish state may be filed within one year of the declaration of unconstitutionality/breach of EU law, even if the tax accrued more than four years ago, because the Spanish administration is required to indemnify individuals for acts that they had no legal duty to comply with. However, in principle, it will not be necessary to use this special proceeding because the statute of limitations has not expired and the ordinary procedure for claiming a refund of unduly paid taxes is still available. ◆

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